Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1996

TAN VOMINH, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

In considering whether civil forfeitures under 21 U.S.C. § 881 and 18 U.S.C. § 981 are so punitive in purpose or effect as to implicate the Double Jeopardy Clause, is a court's inquiry limited to the face of the forfeiture statutes, or may a court also consider the purpose and effect of the forfeiture statutes as applied?

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Petitioner Tan Vominh prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on November 7, 1996, which reversed the order of the United States District Court for the District of Oregon.

OPINION BELOW

The opinion of the Court of Appeals is not officially reported. It is reproduced as Appendix A, infra.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the U.S. Constitution provides in relevant part:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

STATUTORY PROVISIONS

28 U.S.C. § 881 provides in relevant part:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (6) All monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all

> proceeds traceable to such an exchange, and all monies, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter. . . .

18 U.S.C. § 981 provides in relevant part:

> (a)(1) Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:
>
> (A) any property, real or personal, involved in a transaction or attempted transaction in violation of Section 5313(a) or 5324(a) of Title 31, or of § 1956 or 1957 of this title, or any property traceable to such property. . . .

STATEMENT OF THE CASE

In 1977, the government began investigating Thomas Sherrett, an alleged international drug trafficker. By 1988, that investigation had been expanded to include Petitioner Tan Vominh and his spouse, Thanh Hai Vominh, on allegations that the Vominhs assisted Sherrett in laundering drug proceeds by making

currency deposits and purchasing real estate.

On July 26, 1988, federal agents executed search warrants at Petitioner's residence and other locations. On that day, the government seized approximately $443,000 in funds deposited in thirteen bank accounts.

On August 2, 1988, the government filed a civil forfeiture action against the seized bank accounts pursuant to 21 U.S.C. § 881(a)(6). United States v. All Funds, etc., No. CV 88-871-FR. Petitioner filed a claim to those funds in accounts bearing his name. Nearly four years later, on April 10, 1992, Petitioner entered into a settlement agreement with the government. Under the agreement, Petitioner and his spouse forfeited approximately $365,000 to the government.

On July 13, 1990, the government filed a separate civil forfeiture action against real property of Petitioner located in Portland, Oregon. United States v. One Parcel of Real Property, etc., No. CV 90-691-BE. This was pursuant to 21 U.S.C. § 881(a)(6) and what is now 18 U.S.C. § 981(a)(1)(A). Petitioner filed a claim to the property. Petitioner settled this case on August 20, 1990 by paying $15,000 to the government in exchange for dismissal of the forfeiture case.

On October 18, 1990, the government filed a third civil forfeiture case against Petitioner's property, United States v. Block 139 East, Portland, etc., No. CV 90-1069-BE. This also was pursuant to 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A). The case settled on October 22, 1990, whereby Petitioner paid $12,500 to the government in exchange for a

dismissal of the forfeiture case with prejudice.

On September 23, 1992, more than four years after the first of the three civil forfeiture cases was filed, and after all three of the forfeiture cases were concluded, the government filed a 147 count indictment charging Petitioner, his spouse and Sherrett with conspiracy, drug importation and distribution, money laundering, and structuring currency transactions to avoid reporting requirements.

On October 6, 1994, Petitioner moved to dismiss the indictment on the grounds that the prior civil forfeitures of his property were punitive in nature, thus triggering the Double Jeopardy Clause and barring further prosecution.

The district court dismissed the conspiracy and drug charges on double

jeopardy grounds. The district court stated:

> [T]he government's [forfeiture] pleadings reflect a more inclusive prosecutorial approach, offering up a breadth of criminal activity as justification for the forfeiture. As a result, a substantial portion of the government's criminal case against defendants was brought to bear in the forfeiture proceedings.

Opinion Granting Motion to Dismiss, at 17. The district court's ruling was based largely on the Ninth Circuit decision in United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994), rev'd sub nom. United States v. Ursery, _____ U.S. _____, 116 S.Ct. 2135 (1996).

The government then appealed from the district court's ruling. Prior to the time that the Court of Appeals ruled in this case, this Court handed down its opinion in United States v. Ursery, _____ U.S. _____, 116 S.Ct. 2135 (1996). In Ursery, this Court adopted the two-part

test set forth in United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S.Ct. 1099 (1984) to determine whether the forfeitures constituted criminal proceedings. The test is (1) whether Congress intended proceedings under 21 U.S.C. § 881 and 18 U.S.C. § 981 to be civil or criminal, and (2) whether the proceedings were so punitive in fact that they could not legitimately be viewed as civil in nature. 116 S.Ct. at 2147. Applying this test, the Ursery court concluded that the forfeitures did not constitute criminal proceedings that triggered double jeopardy. Id. at 2148-2149. The Ursery Court stated:

> We do not hold that in rem civil forfeiture is per se exempt from the scope of the Double Jeopardy Clause. . . . That a forfeiture is designated as civil by Congress and proceeds in rem establishes a presumption that it is not subject to double jeopardy. . . . Nevertheless, where the "clearest proof" indicates

> that an in rem civil forfeiture is "so punitive either in purpose or effect" as to be equivalent to a criminal proceeding, that forfeiture may be subject to the Double Jeopardy Clause.

____ U.S. _____, 116 S.Ct. at 2148 n. 3 (citations omitted).

After Ursery was decided, the Court of Appeals directed Petitioner to file a brief addressing the impact of Ursery on his case. In that brief, Petitioner argued that Ursery only decided that the forfeiture statutes on their face did not violate the Double Jeopardy Clause. Moreover, Ursery approved parallel civil forfeiture and criminal proceedings. See Ursery, 116 S.Ct. at 2140 ("Since the earliest years of this Nation, Congress has authorized the Government to seek parallel in rem civil forfeiture actions and criminal prosecutions. . . .") (emphasis supplied). Petitioner argued

that his case should be remanded to the district court for a determination whether the filing of the three separate, non-parallel forfeiture proceedings over a period of two years, followed then by the filing of the criminal indictment four years after the first forfeiture case and based on the same conduct and offenses, was so punitive in purpose and effect as to implicate double jeopardy. Petitioner sought a remand for a ruling as to whether "as applied," the forfeiture statutes violated the Double Jeopardy Clause. See Petitioner's post-Ursery Brief, at 8-9.

In its Memorandum decision filed on November 7, 1996, the Court of Appeals rejected Petitioner's argument. Relying on Ursery, supra and United States v. Sardone, 94 F.3d 1233 (9th Cir. 1996), the Court of Appeals stated, "Ursery requires us to look at the statute to determine if

it is punitive, not at the underlying facts of the proceeding." Memorandum Opinion at 2, Appendix A at A-2.

REASON FOR GRANTING THE WRIT

This Court should grant the writ because the issue presents a substantial question of law that merits consideration by this Court. The manner in which the Court of Appeals has interpreted Ursery makes the civil forfeiture statutes immune from any "as applied" challenge on double jeopardy grounds. This is inconsistent with the methodology by which all statutes are measured against constitutional provisions they may affect. That methodology provides not only for "facial" review of the statute itself, but also for "as applied" review to determine whether the effects of the statute as applied in the real world impinge on constitutional

rights.

The seminal case on "as applied" analysis is Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886) in which a facially benign ordinance was struck down because it was applied only against one minority, in violation of the Equal Protection Clause. The Court stated:

> Though the law itself be fair on its face, and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

118 U.S. at 373-374, 6 S.Ct. at 1073.

This Court and the Courts of Appeal have in a variety of contexts acknowledged the propriety of both "facial" and "as applied" review of statutes. For example, this Court conducted a facial analysis of

the Bail Reform Act of 1984 under the Due Process and Excessive Bail Clauses. United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095 (1987). The Court held that the Act on its face violated neither substantive due process nor the Excessive Bail Clause, noting that no "as applied" challenge to the Act had been made. Id. at 755 n.3, 107 S.Ct. at 2106 n.3. The Bail Reform Act is clearly not immune from "as applied" scrutiny. See also, McQuery v. Blodgett, 924 F.2d 829, 835 (9th Cir. 1991) ("to conclude that the relevant [statute] is evenhandedly applicable does not ..entirely dispose of the matter, however. The equal protection clause also requires that the law be even-handed as actually applied") (emphasis in original); Schwartzmiller v. Gardner, 752 F.2d 1341,

1346 (9th Cir. 1984) ("[A] statute may be challenged for vagueness, either 'on its face' or 'as applied').

In Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034 (1977), the Court held that a defendant may take an interlocutory appeal from a decision denying his motion to dismiss a charge on double jeopardy grounds. The rationale for granting this rare exception to the rule against interlocutory appeals is based on the very nature of the interest protected by the Double Jeopardy Clause:

> [T]he guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. . . .
>
> * * *
>
> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with

> all its resources and powers should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . .

Abney, supra, 431 U.S. at 661, 97 S.Ct. at 2041 (1977), quoting Green v. United States, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223 (1957).

Here, three separate forfeiture cases were filed against Petitioner's property in 1988 and 1990. The last of the forfeiture cases concluded in 1992. Later in 1992, a criminal indictment was filed charging Petitioner with those offenses on which the forfeitures were predicated, and based on information known to the government in 1988 when the first forfeiture case was filed. The interests protected by the Double Jeopardy Clause

have certainly been implicated in this case, whether or not the forfeiture statutes at issue are facially constitutional via a vis double jeopardy.

Under the Court of Appeals' interpretation of Ursery, no court is permitted to consider whether on these facts the forfeiture statutes have been applied in a punitive manner for double jeopardy purposes. If the interest at stake under the Double Jeopardy Clause is the avoidance of having to endure the personal anxiety, public embarrassment, and expense of multiple proceedings initiated by the government based on the same offense, that interest cannot be vindicated under the present law of the Court of Appeals.

CONCLUSION

For the reasons stated above, the writ should be granted and the judgment of the Court of Appeals for the Ninth Circuit reversed.

DATED this 26th day of December, 1996.

Respectfully submitted,

NORMAN SEPENUK, P.C.

_____

Norman Sepenuk
Douglas Stringer

Of Attorneys for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Appellee,	)	No. 95-30057
	)	No. 95-30087
v.	)	
	)	D.C. No. CR
TAN VOMINH,	)	92-298-JAR
	)	
Defendant/Appellant.	)	

MEMORANDUM Filed November 7, 1996

Appeals from the United States District Court for the District of Oregon, Robert E. Jones, District Judge, Presiding Submitted November 4, 1996.

Portland, Oregon

BEFORE: CANBY, RYMER, & KLEINFELD, Circuit Judges

The district court found that some counts of a drug conspiracy indictment had to be dismissed because of previous civil forfeitures of the defendants' property. Defendants argue that under the Supreme

Court's decision in United States v. Ursery, 116 S.Ct. 2135 (1996), they are entitled to a remand to determine whether the applicable forfeiture statute as applied is so punitive as to render it criminal. They are not.

In United States v. Sardone, [94 F.3d 1233] (9th Cir. 1996), we explained that Ursery requires us to look at the statute to determine if it is punitive, not at the underlying facts of the proceeding. Sardone, 1996 W.L. 492690 at *3. The defendants' property was seized under 21 U.S.C. § 881(a)(6). In Ursery, the Supreme Court determined that 21 U.S.C. § 881(a)(6) is not criminal or punitive, so it cannot serve as the basis for a violation of the double jeopardy clause. See, Ursery, 116 S.Ct. at 2148. The dismissal on double jeopardy grounds must be reversed. For the same reason, we

affirm the district court's decision to allow certain counts of the indictment to proceed.

In light of Ursery, the district court's decision to allow the money laundering and structuring counts is AFFIRMED. The district court's decision to dismiss the conspiracy, importation and distribution counts is REVERSED and REMANDED to the district court for further proceedings.